

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE
WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals below erred in holding that petitioner was not entitled under the Seventh Amendment to a trial by jury in federal district court in a government-instituted civil action for the recovery of substantial civil penalties under a federal statute.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. PETITIONER WAS ENTITLED TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT BECAUSE THE GOVERNMENT'S SUIT FOR CIVIL PENALTIES INVOLVED ISSUES THAT WERE LEGAL IN NATURE..	3
A. Petitioner Was Entitled To A Jury Trial Under The Seventh Amendment Because The Government's Suit Was Analogous To A Common-Law Action For Debt	3
B. Although All Of The Issues In The Government's Action Are Effectively Legal In Nature, The Seventh Amendment Would Apply Even If Some Equitable Issues Were Also Involved	5
II. CONGRESS IMPLICITLY PRESERVED THE JURY TRIAL RIGHT IN THE CLEAN WATER ACT AND THE RIVERS AND HARBORS ACT BY FAILING TO NEGATE THE RIGHT EXPRESSLY	9
III. THE PUBLIC INTEREST IS SERVED BY PRESERVING THE RIGHT TO A JURY TRIAL	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
<i>Atlas Roofing Co. v. Occupational Safety and Health Review Commission</i> , 430 U.S. 442 (1977)	7, 8, 10
<i>Bailey v. Central Vermont Railway, Inc.</i> , 319 U.S. 350 (1943)	9
<i>Beacon Theatres, Inc. v. Westover</i> , 359 U.S. 500 (1959)	5, 6, 9
<i>Bowsher v. Synar</i> , — U.S. —, 55 U.S.L.W. 5064 (July 7, 1986)	10
<i>Chapman v. Kleindienst</i> , 507 F.2d 1246 (7th Cir. 1974)	9
<i>Curtis v. Loether</i> , 415 U.S. 189 (1974)	4, 9
<i>Dairy Queen, Inc. v. Wood</i> , 369 U.S. 469 (1962)	6
<i>Dice v. Akron, Canton & Youngstown Railroad Co.</i> , 342 U.S. 359 (1952)	9
<i>Hepner v. United States</i> , 213 U.S. 103 (1909)	4
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	10
<i>Parklane Hosiery Co. v. Shore</i> , 439 U.S. 322 (1979)	11
<i>Parsons v. Bedford</i> , 28 U.S. (3 Pet.) 433 (1830)	4
<i>Ross v. Bernhard</i> , 396 U.S. 531 (1970)	6
<i>Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.</i> , 294 F.2d 486 (5th Cir. 1961)	6
<i>United States v. J.B. Williams Co.</i> , 498 F.2d 414 (2d Cir. 1974)	7
<i>United States v. Regan</i> , 232 U.S. 37 (1914)	4
 Constitutional and Statutory Provisions:	
U.S. Const. Amend. VII	<i>passim</i>
Civil Rights Act of 1968, 42 U.S.C. § 3601 <i>et seq.</i>	9
Clean Water Act, 33 U.S.C. § 1251 <i>et seq.</i>	4, 9
Federal Employees Liability Act, 45 U.S.C. § 51 <i>et seq.</i>	9
Federal Trade Comm. Act, 15 U.S.C. § 40 <i>et seq.</i>	7
Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 <i>et seq.</i>	8
29 U.S.C. § 666(k)	8
Rivers and Harbors Act, 33 U.S.C. § 401 <i>et seq.</i>	4, 9

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BRIEF AMICUS CURIAE OF THE
 WASHINGTON LEGAL FOUNDATION
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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 200,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared as *amicus curiae* in a number of cases dealing with the constitutional rights of businesses and individuals. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Pacific Gas & Electric Company v. The Public Utilities Commission of the State of California*, 106 S. Ct. 903 (1986).

WLF believes that the issue involved in this case, i.e., the right to a jury trial where the government is seeking civil penalties, is of utmost importance to citizens, businesses, and unions who are subjected to increasing government regulation and are thus exposed to liabilities that risk their very financial survival. Accordingly, WLF believes it is in the public interest that the important constitutional right to a jury trial be preserved in these circumstances.

STATEMENT OF THE CASE

In the interests of judicial economy, WLF adopts by reference the Statement of the Case as presented by the petitioner in his brief.

SUMMARY OF THE ARGUMENT

A civil suit in federal court seeking civil penalties is an action at law entitling the parties to a jury trial under the Seventh Amendment of the Constitution. Numerous case authority by this Court and lower federal courts have consistently protected this fundamental right to litigants. Accordingly, the majority opinion of the court below erroneously construed these precedents, and erred by ruling that a claim for equitable relief along with a legal claim for civil penalties in the same suit extinguishes the right to a jury trial.

WLF submits that this Court should preserve this fundamental constitutional right to a jury trial, especially where, as here, the full weight of the United States as a plaintiff is being brought to bear against a single citizen. In this way, a jury will be able to temper the overzealousness of government enforcers and the awesome power of federal courts with some measure of restraint.

ARGUMENT

I. PETITIONER WAS ENTITLED TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT BECAUSE THE GOVERNMENT'S SUIT FOR CIVIL PENALTIES INVOLVED ISSUES THAT WERE LEGAL IN NATURE.

The Seventh Amendment to the United States Constitution guarantees the right to a trial by jury in "suits at common law." U.S. Const. Amend. VII. This phrase originally referred to those actions triable in an English court of law, as opposed to a court of equity, when the Amendment was adopted in 1791. An action brought in an English court of law, usually seeking a money judgment, entailed the right to a jury trial, whereas an action in an equity court was tried before the judge. The distinction between legal and equitable issues has evolved throughout U.S. history and, with it, the right to a trial by jury.

A. Petitioner Was Entitled To A Jury Trial Under The Seventh Amendment Because The Government's Suit Was Analogous To A Common-Law Action For Debt.

It is unnecessary to recount here the complete evolution of law and equity, with its origins in the English common law. It will suffice to note that this Court regards the protection granted by the Seventh Amendment as extending not only to those claims which were recognized at common law in 1791, but also to new causes of

action, created by statute, which are *analogous* to common-law actions. *Curtis v. Loether*, 415 U.S. 189, 193 (1974). See also *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) (holding that the Seventh Amendment "may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights").

In the instant case, the government claimed that petitioner Tull violated both the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* The total amount of civil penalties imposed on Tull could have been as high as \$22,890,000. The federal district court below denied Tull's timely request for a jury trial and ultimately required Tull to pay a \$325,000 judgment to the government.

Under settled Seventh Amendment doctrine, this suit for civil penalties by the government was in the nature of an action for debt at common law and was therefore subject to the requirements of the Seventh Amendment. See, e.g., *Hepner v. United States*, 213 U.S. 103 (1909) (stressing, in a government suit for civil penalties under a federal immigration statute, that "whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt") and *United States v. Regan*, 232 U.S. 37 (1914) (plainly stating in the first sentence of the opinion that this suit to collect civil penalties for violation of another immigration statute "was an action of debt prosecuted by the United States"). In *Tull*, the government's recovery of \$325,000 in civil penalties under the Clean Water Act renders this case clearly analogous to a common law action for debt. Therefore the denial of Tull's demand for a jury trial contravened his Seventh Amendment rights.

B. Although All Of The Issues In The Government's Action Are Effectively Legal In Nature, The Seventh Amendment Would Apply Even If Some Equitable Issues Were Also Involved.

The appellate court's characterization of the judgment against Tull as a "package" of remedies within the "statutorily conferred equitable power" of the court, *United States v. Tull*, 769 F.2d 182, 187 (4th Cir. 1985), is a distortion of both fact and law.

As to the factual distortion, the variation in the judgment, which presumably converted Tull's civil penalties into a "package" in the view of the court, was the trial court's offer of an "option." Tull could opt to exchange \$250,000 worth of his judgment liability for the task of restoring a large ditch he had filled to its original condition. 769 F.2d at 185. As the trial judge knew at the time of the offer, for Tull, this was no viable option. Third parties had already purchased the lots which Tull would be required to restore in order to exercise his "option." In other words, there was no "equitable" aspect to the fines imposed on Tull. His penalties were purely legal in nature.

Regarding the court's distortion of the law, it was error to deny a requested jury trial in a case where, by the court's own description, "the assessment of penalties intertwines with the imposition of traditional equitable relief," *Tull*, 769 F.2d at 187. Assessment of civil penalties is clearly a legal issue, and the court's refusal to grant a jury trial for this issue represents a return to the equitable "cleanup doctrine," which permitted a court in a nonjury equity trial to retain jurisdiction over even the legal issues involved. This doctrine, however, was repudiated by the Court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The Court there held that, in an action involving factual questions common to both legal and equitable issues, the trial judge must try the legal issues *first* in order to safeguard the Seventh

Amendment right to a jury trial. The jury's findings of fact would then be binding throughout the entire case—including resolution of equitable issues. Only “under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate,” *id.* at 510-11, should the equitable issues be tried first. *Beacon Theatres* was thus a milestone case, representing the expansion of the Seventh Amendment's applicability and the corresponding curtailment of the scope of equity.

The Court further reinforced the principles of *Beacon Theatres* in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), holding that, in an action seeking both legal and equitable relief, the Seventh Amendment guaranteed a jury trial as to the legal issues. This guarantee applies “whether the trial judge chooses to characterize the legal issues presented as ‘incidental’ to equitable issues or not.” *Id.* at 473. See also *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961) (urging that “it would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable,” because of the overriding power of the Seventh Amendment).

Ross v. Bernhard, 396 U.S. 531 (1970), continued the Court's augmentation of the Seventh Amendment's scope. In *Ross*, the Court held that the traditional view of stockholder derivative actions as equitable in nature did not preclude applicability of the Seventh Amendment. The constitutional jury trial right applied because the same action brought by the corporation itself (rather than by shareholders) would have been legal in nature. Even though *Ross* requires the judge to make the initial determination of whether the corporate claim presents a legal issue, the jury trial right nonetheless applies if such an issue exists.

Judge Friendly conducted a rigorous analysis of the Seventh Amendment right to a jury trial in *United*

States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974). In *J.B. Williams*, the government sought civil penalties for alleged violations of a cease and desist order issued under the Federal Trade Commission Act, 15 U.S.C. § 40 *et seq.* The court held that, even though a federal statute is silent on the jury trial right, the Seventh Amendment demands that a jury trial be granted in a suit by the government for civil penalties under the statute. Judge Friendly flatly stated that “[t]here can be no doubt” about this right. *J.B. Williams*, 498 F.2d at 422.

Ignoring this formidable background of case law on the Seventh Amendment, the majority opinion in *Tull* relies principally on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). Such reliance, however, is misplaced. In *Atlas Roofing*, the Court created a narrow “public rights” exception to the Seventh Amendment, “—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact [and where] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.” *Atlas Roofing*, 430 U.S. at 450 (footnote omitted). Significantly, there is no “administrative forum” created by Congress with respect to the adjudication of issues presented in the instant case.

Amicus also submits that the legal or civil penalty aspects of the case in *Atlas* were not properly addressed by the Court. The petitioners in *Atlas* sought review in this Court of the court of appeals' decision as to whether they were entitled to a jury trial *at the administrative level*. However, the Secretary of Labor *never* sought enforcement of the civil penalties *in a federal district court* where the right to a jury trial would attach. In describing the statutory procedures involved in the *Atlas* case, this Court observed: “If the employer fails to pay the

assessed penalty, the Secretary of Labor may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried, § 666(k)." 430 U.S. at 443 (emphasis added). It is *amicus*' position that any such "collection action" is a legal remedy in the nature of a debt at common law and thus would entitle the defendant to a jury trial. Further, 29 U.S.C. § 666(k) does not on its face preclude retrying the "fact" of the violation and "propriety" of the civil penalty. Thus, while the instant case is clearly distinguishable from *Atlas*, we submit that the legal posture of the case in *Atlas* prevented a focused analysis of the applicability of the Seventh Amendment.

Finally, *amicus* wishes to note that the record does not show that the petitioner violated any "public right" *per se* that could be found in the Clean Water Act or Rivers and Harbors Act. Rather, petitioner was fined solely for failing to get official permission to do what he did, namely, to fill in certain wetlands. Thus, this case is unlike that presented in *Atlas* whereby Congress sought to protect workers by prohibiting certain unsafe work conditions. The Occupational Safety and Health Act of 1970 does not give regulators the power to give official permission to an employer to violate the substantive requirements of OSHA.

In any event, the Court in *Atlas Roofing* did not abandon its long-standing formulation of suits "at common law" as including those which are analogous to traditionally legal causes of action. 430 U.S. at 460. The presence of legal issues in *Tull* is undeniable. The government sought monetary penalties, and Tull denied the government's factual allegations that form the necessary predicate for the imposition of penalties. *United States v. Tull*, 615 F. Supp. 610, 612 (E.D.Va. 1983). The Seventh Amendment to the Constitution thus entitled Tull to a jury trial.

II. CONGRESS IMPLICITLY PRESERVED THE RIGHT TO A JURY TRIAL IN THE CLEAN WATER ACT AND THE RIVERS AND HARBORS ACT BY FAILING TO NEGATE THE RIGHT EXPRESSLY.

When interpreting statutes that are silent on the right to a jury trial, federal courts often hold that Congress' failure to provide expressly for nonjury trial implies that the right to a jury trial remains. For example, the Federal Employee's Liability Act, 45 U.S.C. § 51 *et seq.*, is silent on the jury trial issue. However, this Court has held that when a party sues under this statute, the right to a jury trial is "part and parcel of the remedy." *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 354 (1943). Thus, even though a jury trial is not required by the Seventh Amendment in a federal statutory action, the jury trial right is so fundamental to our system of civil jurisprudence that it cannot be denied unless expressly negated. The Court adhered to this view again in *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952). See also *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959); *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974).

Thus, while Congress may have the power to exempt a statute from the scope of the Seventh Amendment by providing for enforcement in a special court or administrative proceeding, each of the statutes under which Tull was prosecuted fails to provide for any such special procedures. Further, neither the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, nor the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.*, denies a party the right to a jury trial.¹ The legislative history of these statutes does not

¹ Even when a statute's history does indicate that Congress may have preferred nonjury trial, there is a presumption in favor of the jury trial right. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court heard arguments that Congress intended nonjury trials for actions under the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* The Court responded to this evidence by holding that legal actions brought under federal statutes entail the right to a jury trial, unless there is a "functional justification for denying the jury trial right." *Curtis*, 415 U.S. at 195.

demonstrate that such a denial was intended. Thus, a right to a jury trial must be found intact.

In the instant case, there was no functional justification for the denial of a jury trial. Because Congress did not expressly negate the jury trial right in either the Clean Water Act or the Rivers and Harbors Act, Tull's request for a jury trial should have been granted.

III. THE PUBLIC INTEREST IS SERVED BY PRE-SERVING THE RIGHT TO A JURY TRIAL.

The distinction between the administrative forum provided by Congress in *Atlas Roofing* and the absence of such forum in this case is significant. As this Court said in *Atlas Roofing*, "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field." 430 U.S. at 456. In this case, Congress did not establish an administrative forum to adjudicate this matter, but expressly provided *de novo* review in federal district courts. While *amicus* recognizes that court dockets are crowded, the Congress nevertheless directed that these cases be heard in federal courts. Consequently, a right to a jury trial for civil penalties would be totally compatible with the intent of Congress involving, at best, only a slight increase in the expenditure of judicial resources.

This Court should resist any notion that a reversal of the court below would further crowd courts' dockets. While, no doubt, a court sitting without a jury is a more convenient mechanism, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 945 (1983); *Bowsher v. Synar*, — U.S. —, 55 U.S.L.W. 5064 (July 7, 1986).

As Justice Rehnquist stated:

The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury

surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 347 (1979) (Rehnquist, J., dissenting). Although *Parklane* involved a suit by private litigants, the right to a jury trial is equally if not more important where the government is the plaintiff. For as Justice Rehnquist further observed, "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." 439 U.S. at 344 (Rehnquist, J., dissenting).

In any event, in cases brought by the government, many factual issues have been disposed of by full or partial summary judgment without the necessity of a jury. Thus, a preservation of the right to a jury trial would not unduly prolong the disposition of cases of this type.

CONCLUSION

For all the foregoing reasons, *amicus* submits that the decision below should be reversed.

Respectfully submitted,

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